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IN THE

Supreme Court of the United States

October Term, 1974
No. 74-171
No. 74-181

STATE OF LOUISIANA,

Petitioner,

vs.

WILLIAM E. SIMON, *et al.*,

Respondents.

THE PEOPLE OF THE STATE OF CALIFORNIA, acting by and through the State Lands Commission, *et al.*,

Plaintiffs-Petitioners,

vs.

JOHN C. SAWHILL, *et al.*,

Defendants-Respondents.

Brief of Amici Curiae in Opposition to Petition for Writ of Certiorari.

Interest of Amici Curiae.

Independent Oil Refiners Association of California, Inc., is a trade association representing 15 small independent refiners located in the State of California. Edgington Oil Company is a small independent refiner and a member of the association. These Amici have actively participated in the proceedings before the agency, the District Court, and the Court of Appeals.

The interest of the small independent refiner can be found in the findings made by the Federal Energy Office ("FEO") at the time it decided to adopt the rule in question. The FEO found, "It appears that much of the crude oil sold by State and local governments is purchased by small independent refiners which, if they are required to pay the substantially higher prices now obtainable for uncontrolled crude oil, may experience severe competitive harm. Thus, although the relative quantity of crude oil involved is small, the effects of the exemption are focused on a particular segment of the industry, and the preservation of the competitive viability of small and independent refiners, which is a specific objective of the [Emergency Petroleum Allocation] Act, would not be adequately accomplished unless the exemption is removed." (39 F.R. 7177).

To illustrate the impact upon the independent refiner, a particular grade and gravity of crude oil which sold for $2.85 per barrel on May 15, 1973 (prior to Phase IV regulations) would now sell for $4.20 per barrel[1] if subject to price controls but would sell for about $9.20 per barrel[2] if exempt from price controls. The traditional role of the independent refiner and marketeer has been to sell at prices competitive to those of the major oil companies. The independent refiner could not continue to compete with the vertically integrated major oil companies if government-owned oil were exempt and therefore more than twice the price of oil obtained from private sources.

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[1]FEO Regulation Section 212.73 allows a producer to charge $1.35 per barrel over the highest posted price on May 15, 1973, for that particular grade at that field.

[2]There is a price spread of about $5.00 per barrel between controlled prices and uncontrolled prices (39 F.R. 12254).

In the administrative proceedings for the adoption of the rule, the FEO specifically found: (1) The exemption would be harmful to the competitive position of independent refiners (39 F.R. 12252-54); (2) continuance of the exemption would result in windfall revenues for State and local governments (39 F.R. 7176, 39 F.R. 12254); and (3) removal of the exemption would not create windfall profits for refiners (39 F.R. 12254).[3]

Statement of the Case.

No dispute is presented regarding the substantive merits of the FEO rule withdrawing the State and local government exemption. The attack against it is directed purely to the procedure involved. Petitioners contend (and we dispute) that the rule of February 21, 1974 was invalid on the grounds: (1) that the Notice of October 25, 1973[4] had been constructively terminated prior to February 21, 1974, by intervening events, and (2) that the rule of February 21 could not legally be made effective October 25, 1973.

Petitioners' Statement of the Case needs amplification in several respects material to their contentions.

Petitioner California states (p. 10) that the CLC never took any action pursuant to the Notice of Octo-

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[3]Federal price controls operate in such a manner as to prevent refiners from pocketing the cost savings as profits (39 F.R. 12254).

[4]On October 25, 1973, the Cost of Living Council ("CLC") issued a Notice of Proposed Rule Making, to be effective October 25, 1973, if adopted (38 F.R. 29618-19). On December 26, 1973, the CLC delegated to the newly created Federal Energy Office ("FEO") authority to act upon outstanding matters initiated by the CLC (39 F.R. 24). On February 21, 1974, the FEO adopted the proposed rule, effective as of October 25, 1973 (39 F.R. 7176-77).

ber 25, 1973. That is a true but incomplete statement. Petitioners neglect to include in their otherwise detailed Statement of the Case any reference to Delegation Order No. 47 (December 26, 1973)[5] by which the CLC delegated to the FEO its responsibility for price regulation of petroleum products and expressly confirmed and ratified "all orders, regulations, circulars or other directives issued and all other actions taken" by the CLC and provided that all such matters should remain in full force and effect unless or until altered, amended or revoked by the FEO.[6]

Petitioner State of California recites in its Statement of the Case (p. 11): "The summary preceding the January 14 regulations (39 F.R. 1924) stated '. . . no specific future changes [in the regulations] are currently anticipated,' but did invite comments upon the entire complex system for allocation and pricing set forth in the regulations." The partial sentence quoted by the State of California is taken out of context, and the reference to "allocation and pricing" is a bit of editorializing. The full text of this FEO announcement is set out in the Appendix to California's Petition, pages 96 to 98.[7] The significance of the out-of-context quote

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[5]39 F.R. 24, January 2, 1974; App. to Calif. Pet., pp. 91-93.

[6]At a later point in its brief ("Argument", p. 15), petitioner State of California does refer generally to the transfer of authority, describing it as an intervening circumstance which would cause them to believe that the Notice had been terminated.

[7]Basically, the announcement recited the authority for the regulation, the recent history, the fact that there had been a substantial revision to the allocation provisions, that the price provisions previously incorporated by reference to CLC regulations were now recodified and set forth in the same title as the allocation regulations, followed by the specific sentences here referred to. "Due to the fact that a substantial revision of the regulatory scheme has occurred and the Federal Energy Office realizes that unanticipated problems with the regulations will

and the editorializing is illustrated by the following discussion from the Opinion of the Court of Appeals (App. to Calif. Pet., pp. 15-16):

> "The appellees extract from the January 14, 1974, order the phrase '. . . although no specific future changes are currently anticipated . . .' and argue that this warranted the assumption on their part that the change contemplated by the pending rule making proceeding had been abandoned. This disregards the preceding sentence stating that 'a substantial revision of the regulatory scheme has occurred and the Federal Energy Office realizes that unanticipated problems with the regulations will surely arise.' There had been a substantial revision as to allocation provisions but not as to prices."

I

The Decision of the Court of Appeals Was Correct.

A. The Notice of Rule Making Was Not Terminated by Intervening Events.

The first Question Presented by both Petitioners (Calif. Pet., p. 4; La. Pet., p. 3)[8] is their contention that the rule-making proceeding initiated by the Notice of October 25, 1973, was terminated on or before January 14, 1974, as a result of intervening circumstances.

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surely arise, the Federal Energy Office is inviting comment on these regulations. Although no specific future changes are currently anticipated, the Federal Energy Office would appreciate all comments or suggestions which might assist in future changes to the program."

[8]Louisiana frames the first issue generally, in terms of whether or not the rule of February 21, 1974, was valid; but the underlying contention is the same. "It is the position of the State of Louisiana that the notice of October 25, 1973 was no longer viable when the FEO issued its rule of February 21, 1974." (Pet., p. 9.)

This issue was identified by the Court of Appeals (Opinion, p. 2) and Petitioner California (Pet., p. 14) as the decisive issue of the case; we concur.

Petitioners cite no legal authority for their proposition of an implied or constructive termination. Instead, they point to circumstances by which they "reasonably concluded" that the rule-making process was at end. For purposes of discussion below, we group these "intervening" circumstances cited by Petitioners as follows: (1) the four-month time interval between the Notice of October 25, 1973 and the Rule of February 21, 1974; (2) the FEO regulations and announcement of January 14, 1974; and (3) other circumstances.

Petitioners complain of the four-month time lag between the Notice of October 25, 1973 and the adoption of the rule on February 21, 1974, arguing in effect that the Notice expired with the passage of time. Petitioner State of Louisiana states the case as follows: "If this position were to be sustained then it would appear that an administrative agency could issue one Notice of proposed rule making and then issue rules based on that Notice for months and even years thereafter, a result which could of course not be sanctioned" (La. Pet., p. 7). The hyperbole helps to demonstrate the fallacy of their argument. "Years" are not involved; and we suggest that "months" are quite normal in an administrative rule-making process.[9] With respect to the four-month time period here in question, one month was consumed by the solicitation of comments (October 25, 1973, to November 24, 1973). Three days later, the Emergency Petroleum Allocation Act was enacted.

[9]The Administrative Procedure Act (5 U.S.C. § 553) requires notice and an opportunity to comment before the adoption of a regulation.

During the next one and one-half months plus (November 27, 1973 to January 14, 1974), working under a Congressional deadline, a new agency was formed and complex petroleum allocation regulations were developed and promulgated. Simply stated, the problem posed by Petitioners' contention is not present in this case. As to the general proposition of how long a notice of proposed rule making remains viable where the agency has not acted, the Court of Appeals stated:

> "No case has been called to our attention, nor can we find any, which applies a doctrine of constructive termination of a rule making proceeding after its express termination by final decision of the responsible agency with the result of reversing the effect of that express determination contrary to the findings and intent of the agency. This is not to say that under some circumstances bad faith, basic unfairness or unconscionable delay could not justify a different result. Such were not present here." (Opinion, pp. 13-14 of App. to Calif. Pet.).

Petitioners contend that the FEO actions of January 14, 1974, caused them to assume that the Notice of October 25, 1973 was no longer viable and that the FEO had made a final decision to retain the exemption (Calif., p. 11; La., pp. 9-10). Specifically, they point to the fact that the price regulations published on that date contained the exemption and the fact that the accompanying announcement stated in part, ". . . no specific future changes are currently anticipated . . ." (App. to Calif. Pet., pp. 96-98). The partial sentence they quote is out of context.[10] The regulations of

[10]Discussed *supra*, at note 7.

January 14 were based on a Notice of proposed rule making issued on December 12, 1973[11]—not on the Notice of October 25, 1973. On January 14, no mention was made of the Notice of October 25, 1973, or the subject matter thereof.[12] There was no discussion of the exemption, nor any other indication that the question of whether or not there should be an exemption had been considered or acted upon. The price regulations were described only as a republication of the regulations in a different section of the Code for convenience. The States did not inquire of the agency whether the rule-making proceeding had been abandoned (Opinion, p. 16 of App. to Calif. Pet.). When their "assumption" was subsequently brought to the attention of the FEO, the agency stated that it did not, on January 14, 1974, intend to act upon the Notice of October 25, 1973 (39 F.R. 12252-53).

The other intervening circumstances alleged by Petitioners, including the adoption of the Emergency Petroleum Allocation Act and an increase in the disparity between ceiling and exempt prices, were circumstances which weakened rather than strengthened the position of Petitioners that the exemption should be continued.[13] In its rulings of February 21, 1974, and April 2, 1974, these were circumstances cited by the

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[11]"The purpose of this amendment is to revise Chapter II of Title 10 of the Code of Federal Regulations. A notice of proposed rulemaking containing a Proposed Mandatory Petroleum Products Allocation Program was issued on December 12, 1973." (39 F.R. 1924).

[12]The first time after its issuance that the Notice of October 25, 1973 was mentioned was on February 21, 1974, when the FEO expressly cited it as authority for the adoption of the rule of that date.

[13]Discussed in Opinion (p. 15, App. to Calif. Pet.).

FEO as reasons for the removal of the exemption.[14] The transfer of authority from the CLC to the FEO, cited by California at page 15 as a circumstance which caused them to believe that the Notice had been terminated, contained an express provision that outstanding matters were not terminated by the transfer.[15]

B. The Federal Energy Office Did Not Err in Making the Rule Effective October 25, 1973.

When the FEO adopted the rule on February 21, 1974, they made it effective as of October 25, 1973. Both Petitioners contend (Calif. Question 3, p. 4; La. Question III, p. 3) that this was retroactive rule making and therefore invalid, citing cases regarding retroactive rule making.

But we are not concerned with retroactivity in the usual sense. It is on this basis that the cases cited by Petitioners are distinguishable. Involved here were prices which from the very inception of the rule-making pro-

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[14]One of the specific purposes of the Emergency Petroleum Allocation Act was to protect the competitive viability of the independent refiner and marketeer (39 F.R. 7177); the disparity between ceiling and exempt prices meant that a class of refiners purchasing predominantly exempt oil from the states would not be able to compete effectively with major oil companies owning or controlling large amounts of private, price-controlled oil (39 F.R. 12253-54).

[15]The transfer of authority was accomplished by two documents. On December 4, 1973, E.O. 11748 (38 F.R. 33575-76, Dec. 6, 1973) established the FEO, delegated to it authority under the EPAA and the ESA, and directed further delegations of authority from the CLC to the FEO. On December 26, 1973 (Delegation Order No. 47, 39 F.R. 24, January 2, 1974), the CLC delegated to the FEO its responsibility for price regulation of petroleum products and expressly confirmed and ratified "all orders, regulations, circulars and other directives issued and all other actions taken" by the CLC and provided that all such matters should remain in full force and effect unless or until altered, amended or revoked by the FEO.

ceeding could be regarded as conditional. The rule-making process was an ongoing one and the October 25, 1973, Notice clearly stated that the change, if made, would be effective as of said date.

Assuming that there was retroactive application, the rule still does not necessarily fail. The Court of Appeals, citing the "balancing" test of *SEC v. Chenery*, 332 U.S. 194 (1947),[16] held that this was not the type of retroactivity condemned by law. Typical retroactivity questioned but accepted in the cases has involved situations where there was no advance notice, unlike the situation involved here. This situation involves few, if any, of the problems of retroactive regulation generally. "In any event, the effective date of the rule in question is not only fair and reasonable but well designed to advance legitimate statutory and administrative policies." (Opinion, p. 18, of App. to Calif. Pet.).

With respect to the "30 day" argument raised by Petitioners (Calif. Pet., pp. 23-24; La. Pet., pp. 10-11), the Court of Appeals held that there were cogent reasons for the withdrawal of the exemption as of the date of the Notice (Opinion, pp. 18-19 of App. to Calif. Pet.). In its ruling of February 21, 1974, the FEO made specific findings regarding the adverse impact of the exemption upon the national distribution system and stated that the rule was made effective that date because the Notice of October 25, 1973, had explicitly provided that the rule, if ultimately adopted, would apply to all deliveries occurring after that date (39 F.R. 7176-77).

[16] "[R]etroactivity must be balanced against the mischief of producing a result which is contrary to the statutory design or to legal and equitable principles. If that mischief is greater than the ill effect of the retroactive application of a new standard, it is not the type of retroactivity which is condemned by law." 332 U.S., at 203.

C. The Court of Appeals Did Not Overturn the District Court's Findings of Fact.

Petitioner State of Louisiana contends (pp. 18-19) that the Court of Appeals overturned the District Court's Findings of Fact. Throughout these proceedings in both courts, there has been no dispute as to the facts[17]—only as to the legal conclusions to be drawn from uncontested facts. The so-called "Findings of Fact" were prepared by Petitioner's attorneys at the direction of the District Court.[18] The Court of Appeals stated, "Where they are in conflict with the views herein expressed they are either not findings of fact at all, or mixed findings of fact and conclusions of law made under an erroneous view of controlling law, as to which the effect of the clearly erroneous rule is dissipated. [Citing cases]" (Opinion, p. 20 of App. to Calif. Pet.).

D. There Are Alternate Grounds in Support of the Court's Decision.

Before the Court of Appeals, these Amici asserted alternate grounds in support of the Court's ultimate decision. The Court reserved ruling on them in view of its ruling that the termination of the exemption by the FEO was valid (Opinion, note 5, at p. 4 of App. to Calif. Pet.).

These alternate grounds in support of its decision which the Temporary Emergency Court of Appeals did not rule upon were basically as follows. Even if the

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[17]The injunction granted by the District Court was based on uncontroverted affidavits; there was no formal trial (Opinion, p. 9 of App. to Calif. Pet.).

[18]District Court Opinion, p. 28 of App. to Calif. Pet.

termination of the exemption were invalid, the rule of January 14, insofar as it purported to exempt State and local governments from price controls, was itself invalid: (1) because the announcement of January 14 did not contain a concise general statement of the basis and purpose for the exemption, as required by Section 553(c) of the Administrative Procedure Act; and (2) because subsections (a), (e), and (g) of Section 4 of the Emergency Petroleum Allocation Act preclude any exemptions to the regulations other than those provided in 4(e)[19] or those added by the amendment procedure of 4(g)(2), a procedure which was not followed.[20]

In further support of the Court's decision, subsection (d) of Section 211 ("Judicial Review") of the Economic Stabilization Act provides that no regulation of the CLC or the FEO shall be set aside unless a final judgment determines that the regulation was in excess of the agency's authority, was arbitrary or capricious, or was otherwise unlawful under the criteria set forth in Section 706(2) of Title 5, U.S. Code. Section 706 does allow a court to set aside an agency regulation on procedural grounds, but it also provides that in so doing, the reviewing court shall take due account of the rule of "harmless error". Thus, even if the Notice of October 25 had been terminated, the error was harmless in view of the opportunities afforded to Petitioners to submit their comments, both before and after the

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[19]Section 4(a) provides that the price regulations shall apply to all sales of crude oil except as provided in subsection (e). Subsection (e) provides for one mandatory and one discretionary exemption, neither of which is applicable here.

[20]Even if available, the amendment procedure of 4(g)(2) requires a series of findings by the agency and a period of review by Congress before the exemption can become effective.

rule of February 21, 1974.[21] The Court of Appeals, having determined that the Notice had not been terminated, stated that it was not necessary to rule upon this contention (Opinion, p. 11 of App. to Calif. Pet.).

II

There Is No Conflict of Decision.

There is no conflict of decision on the issues here involved, *i.e.*, whether or not the Notice of rule making had been terminated, and whether or not the regulation was unlawfully retroactive.

Petitioner California (Pet., p. 4) cites only a conflict in principle, *i.e.*, an alleged "conflict with the decisions of this Court and other Federal Courts in its interpretation of the fundamental rights conferred upon those affected by administrative regulations under the Administrative Procedure Act."

At page 6, Petitioner Louisiana alleges that this decision is in conflict with other decisions of other Federal Courts of Appeals and of the United States Supreme Court. Significantly, they do not cite the other cases alleged to be in conflict.

III

There Is No Important Question of Federal or State Law.

Petitioner Louisiana (Pet., p. 6) alleges, "Moreover, the case involves an important state question as well as an important question of federal law which has not been, but should be settled by this Court, all within the contemplation of Rule 19(b) of the rules of this

[21] In a different context, the Court of Appeals said, "There is simply no indication that any significant arguments were withheld or disregarded or that the appellees were unfairly treated." (Opinion, pp. 16-17).

Honorable Court." They do not identify, and we are unable to locate in either petition, the important question of federal or state law.

Both Petitioners (Calif. Pet., p. 4; La. Pet., p. 21) do allege the importance of the issue in terms of the dollar amount of the revenues lost by the states because their exemption was not continued. The Temporary Emergency Court of Appeals stated (Opinion, p. 16), "On no theory did appellees have a vested right to a continuation of the preferential treatment." These oil producing states, like other private producers of crude oil, already receive $1.35 per barrel more for their oil than they received prior to the imposition of the Phase IV price controls. At issue is an additional $5.00 per barrel surcharge which the FEO found would represent "windfall revenues" to these states.[21]

IV

The Question Presented Is Unique and Not Likely to Recur.

Petitioner State of California prefaces its description of the Questions Presented with, "Because of the unique character of this case, a short general summary of the facts is necessary to convey the significance of these specific questions presented for review." (p. 2).

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[21]"Certain government units have urged that removal of the exemption would deprive them of added revenues. The FEO has concluded, however, that substantial additional revenues have already been realized by State and local governments from royalty crude oil due to the increases in the crude oil ceiling prices pursuant to the provisions of Subpart D of 10 CFR Part 212. The FEO believes that the still further revenues obtainable through the sale of crude oil at uncontrolled prices would represent, in effect, windfall revenues for those State and local governments having crude oil interests, at the expense of the adverse impact on the overall objectives of Act, as discussed above." 39 F.R. 7177. By contrast, the FEO found that the elimination of the exemption would not result in windfall profits to refiners. 39 F.R. 12254.

One and one-half pages later, Petitioner State of California then frames its first Question as "1. Whether, *under the aforesaid circumstances,* the Federal Energy Office had already terminated the rule making process (etc.) . . ." (Emphasis added).

This narrow issue is the one identified by the Court of Appeals (Opinion, p. 2 of App. to Calif. Pet.) and Petitioner State of California (Pet., p. 14) as the decisive issue of the case.

The Court of Appeals stated, "We think the appellants are right in saying that but for unique circumstances which caused FEO to promulgate a massively complex allocation scheme and hold the issue of State and local government price exemption in abeyance until the issues could be approached in a conscientious manner, this controversy never would have arisen." (Opinion, p. 13 of App. to Calif. Pet.).

Where the question presented is unique on its facts and not likely to recur, its precedent-setting value is minimal, and this is a further reason why this Court should deny the Petitions for Writ of Certiorari.

Conclusion.

For the foregoing reasons, it is respectfully submitted that the Petitions for Writ of Certiorari should be denied.

Respectfully submitted,

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